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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 253

GEORGE GRAFF,
Petitioner,

vs.

H. SAM PRIEST, as President of the Board of Police Commissioners of the City of St. Louis, Missouri, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now George Graff, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Missouri, and to remove therefrom to this Court for review the record in the case lately pending in said Supreme Court of the State of

Missouri styled "George Graff, Respondent, v. H. Sam Priest, as President of the Board of Police Commissioners of the City of St. Louis, Missouri et al., Appellants," being cause No. 40171 on the docket of said Supreme Court of the State of Missouri.

The duly certified record, including all the proceedings in the Circuit Court of the City of St. Louis, State of Missouri, wherein said cause was instituted, and in the Supreme Court of the State of Missouri, to which an appeal was taken by said H. Sam Priest, as President of the Board of Police Commissioners of the City of St. Louis, Missouri, et al., from the judgment of the trial court, is herewith filed under separate cover.

Your petitioner, George Graff, represents that he is aggrieved by the judgment of the Supreme Court of the State of Missouri entered in said cause, wherein the said Supreme Court of Missouri reversed the judgment of the trial court, and on the 12th day of May, 1947, thereafter, denied this petitioner's motion for a rehearing of said cause, or, in the alternative, to transfer said cause to said Supreme Court of the State of Missouri *en banc*, and entered a final judgment reversing the judgment of the trial court.

Your petitioner further states that the matters of issue in said cause are of a Federal nature and are of peculiar gravity and importance, in that said cause was brought to secure a determination, and involves questions, of whether an Act of the 63rd General Assembly of the State of Missouri (now published in Laws of Missouri, 1945, pp. 1032-1035, and hereinafter set out in full in the appendix hereto) is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in that the decision of the Supreme Court of the State of Missouri, complained of, is in conflict with

the applicable decisions of this Honorable Court upon the questions involved and the principles announced by this Court in those decisions.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

On July 1, 1946, and for some years prior thereto, this petitioner owned and operated a theater cafe or club known as the "Club 400", in the City of St. Louis, Missouri (R. 1-2, 33, 38). The said business of petitioner was one in which, among other things, good and wholesome food, beverages in the form of soft drinks only, and high grade entertainment by nationally known and recognized entertainers, were sold or provided for compensation, and floor shows were given at 11:00 o'clock P. M., and at 1:00 o'clock and 3:00 o'clock A. M. on each night (R. 2, 34, 38). Petitioner did not possess any license for the sale of intoxicating liquor in his theater cafe (R. 2, 34, 39), and, although he did not encourage the drinking or consumption of intoxicating liquor upon his premises, a substantial number of his adult customers were accustomed to, and did, engage in the drinking and consumption of intoxicating liquor there, and petitioner did not prohibit them from so doing (R. 2, 38). Petitioner's said business was always conducted by him, and by his customers, in a lawful and peaceful manner, without inconvenience or disturbance to others (R. 2, 38). It was built up and organized by petitioner, after many years of effort and great expense on his part, into an established course of dealing, was greatly dependent upon public confidence, estimation and good will, and was profitable to petitioner (R. 2, 34, 39). Petitioner had, and has, a large investment in the business, and in the furniture and fixtures thereof which are peculiarly adapted to petitioner's said business, at its aforementioned location (R. 2, 34, 39). In connection with

the operation of his said business, petitioner paid large sums to the city, state and federal governments for taxes (R. 2, 34, 39).

Petitioner's theatre cafe accommodated 400 or 500 customers at the tables therein (R. 21), and it had a dance floor which was hydraulically operated so that it could be raised to about the height of a table, in which position it was used as a stage for the floor shows (R. 20). These shows were of about 45 minutes duration, and were given at 11:00 p. m., 1:00 a. m. and 3:00 a. m. (R. 20, 26). In the interim between these floor shows, the dance floor, in its lowered position, was used for dancing by petitioner's customers, and an orchestra furnished music for the dancing (R. 20, 21). In this connection the petitioner was required to have a dance hall license (R. 27). Petitioner sold food to his customers, and made a charge for admission, termed a "cover charge," which included the furnishing to such of his customers as might desire a variety of kinds and flavors of soft drinks and ice to ice them (R. 19, 20, 27). Petitioner's cafe was open to the public from 10:00 p. m. to 4:00 a. m. of the day following (R. 26). Petitioner did not cater to juveniles, and his place of business was under the supervision of the delinquency squad and the morality squad of the City Police Department (R. 22). Petitioner had no license for the sale of intoxicating liquor (R. 27), did not furnish any alcoholic or intoxicating liquors to his customers in any way (R. 19), but about half of his customers, according to his estimate, were accustomed to and did consume intoxicating liquor of their own in his cafe (R. 22), and he permitted them to do so (R. 26). Petitioner advertised his business extensively and continuously, but never advertised that he sold liquor, or that he permitted the drinking of liquor upon his premises, or that he furnished "set ups" (R. 27).

By an Act of the 63rd General Assembly of the State of Missouri, approved January 18, 1946 (Laws of Missouri, 1945, pp. 1032-1035, Mo. R. S. Ann., § 4895a), effective (if valid) on July 1, 1946 (Cf. Laws of Missouri, 1945, pp. 2019, 2023), the Liquor Control Act of that state (Chap. 32, Art. 1, §§ 4874-4949, Revised Statutes of Missouri, 1939) was amended by the addition of a new section, to be known as § 4895a. This new section, by its terms, is applicable to "any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor"—which includes petitioner in the operation of his aforesaid business—and makes it unlawful for any such person "to permit the drinking or consumption of intoxicating liquor in, on or about said premises between ten o'clock P. M. and six o'clock A. M. the following day, without having a license as in this section provided." This new section, by its terms, further goes on to provide for the mechanics and requirements of securing a license under it; fixes the license fee; provides specific times within which and persons by whom the drinking or consumption of intoxicating liquors is permitted upon premises licensed under the section—which regulations are substantially identical with those governing places and persons licensed to sell intoxicating liquor by the drink under the Missouri Liquor Control Act;[1] empowers the Supervisor of Liquor Control of Missouri to promulgate regulations for the construction and enforcement of the section, and to suspend or revoke licenses for violations of such regulations or such section; makes it a misdemeanor for any person operating premises within the terms of this section, or any employee, agent, representative, partner or associate of such person, to knowingly violate any of the provisions of such section or any laws

[1] Cf. §§ 4885, 4891 and 4892, Revised Statutes of Missouri, 1939, as amended; Mo. R. S. Ann. §§ 4885, 4891 and 4892.

or regulations applicable to the conduct of such premises; and declares any premises operated in violation of the section, or where intoxicating liquor is consumed in violation of such section, to be a public and common nuisance which may be enjoined.

On July 2, 1946, this petitioner filed his petition in the Circuit Court of the City of St. Louis, State of Missouri (R. 1-13), to test the constitutional validity of the aforementioned Act of the 63rd General Assembly of Missouri. Petitioner's action was in the nature of one under the Missouri Declaratory Judgment Act,[2] and asked injunctive relief against the defendants (respondents here), who were the police commissioners, chief of police, chief of detectives, circuit attorney and prosecuting attorney of the City of St. Louis, Missouri, and the Supervisor of Liquor Control, Deputy Supervisor of Liquor Control and Attorney General of the State of Missouri. In his said petition this petitioner alleged that said Act was in violation of certain specified provisions of the Constitution of Missouri, and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprived this petitioner of due process of law (R. 8-9) and equal protection of the laws (R. 9-10).

Thereafter, on the same day, to wit: July 2, 1946, the said Circuit Court of the City of St. Louis, Missouri, duly made and entered of record an order, directed to the defendants in said cause (respondents here), to show cause why a temporary injunction should not be granted (R. 13).

Thereafter, on July 24, 1946, a hearing was duly had on said order to show cause why a temporary injunction should not be granted (R. 14-30), at which hearing plaintiff in said cause (petitioner here) adduced evidence in sup-

2 §§ 1126-1140, Revised Statutes of Missouri, 1939; Mo. R. S. Ann., §§ 1126-1140.

port of his said petition in said cause, and said order to show cause was taken under submission.

Thereafter, on September 9, 1946, said Circuit Court of the City of St. Louis, Missouri, duly made and entered of record an order granting plaintiff in said cause (petitioner here) a temporary injunction against defendants in said cause (respondents here), pending full and final hearing of said cause upon its merits (R. 30-31).

Thereafter, on October 1, 1946, the defendants in said cause (respondents here) filed their answer to the petition of plaintiff in said cause (petitioner here), admitting and denying various allegations of the said petition, so as to contend that the Act in question was in all respects and provisions valid and constitutional (R. 33-35).

Thereafter, on October 1, 1946, there was filed in said cause a stipulation of the parties (R. 32-33) that the cause might be taken as submitted on its merits upon the evidence adduced at the hearing on the order to show cause on July 24, 1946, and said cause was thereupon, on said 1st day of October, 1946, taken as submitted on its merits, upon said evidence, by said Circuit Court of the City of St. Louis, State of Missouri (R. 35-36).

Thereafter, on October 10, 1946, by judgment and decree duly made and entered of record in said cause (R. 37-50), said Circuit Court of the City of St. Louis, State of Missouri, ruled and held said Act of the 63rd General Assembly of Missouri to be in violation of certain provisions of the Constitution of Missouri—not here material —and in violation of the due process of law and equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 45-46, 47). Said Circuit Court, accordingly, declared said Act illegal, null, void, of no effect and unenforcible against plaintiff in said cause (petitioner here),

and permanently restrained and enjoined defendants in said cause (respondents here) from enforcing, or attempting to enforce, said Act (R. 49-50).

Thereafter, defendants in said cause (respondents here) duly appealed from said judgment and decree to the Supreme Court of the State of Missouri (R. 50-52), where the said judgment and decree of the said Circuit Court was, on April 21, 1947, reversed (R. 53-54) and an opinion filed (R. 54-64).

This petitioner, in due time, filed in said cause in said Supreme Court of the State of Missouri his motion for a rehearing, or, in the alternative, to transfer said cause to the Supreme Court of the State of Missouri *en banc* (R. 64), which said motion was entertained, but, on the 12th day of May, 1947, the said Supreme Court of the State of Missouri denied said motion (R. 65). The said Supreme Court of the State of Missouri having denied this petitioner's said motion for a rehearing, or, in the alternative, to transfer said cause to said Court *en banc*, on said date, the judgment of said Court thereupon became final.

OPINIONS OF THE COURTS BELOW.

There was no "opinion" of the trial court. The decree entered by the trial court appears at pages 37-50, inclusive, of the printed transcript of record herewith filed, but said decree is not otherwise reported.

The opinion of the Supreme Court of the State of Missouri appears at pages 54-64, inclusive, of the printed transcript of record herewith filed. It is reported as Graff v. Priest et al., 201 S. W. 2d 945, but is not yet officially reported in the Missouri Reports.

JURISDICTION OF THIS COURT.

1.

Jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of January 31, 1928, c. 14, § 1, 45 Stat. 54, U. S. Code, Title 28, § 344, par. (b), permitting petitions for certiorari to be prayed for and issued to the highest courts of the various states where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States.

2.

The statute of the State of Missouri, the validity of which is here involved, appears in Laws of Missouri, 1945, pp. 1032-1035, and is set out *verbatim* in the Appendix hereto.

3.

The Supreme Court of the State of Missouri is the highest court of that State.

The original date of the judgment of the Supreme Court of the State of Missouri here sought to be reviewed is April 21, 1947 (R. 54).

Petitioner's motion for a rehearing, or, in the alternative, to transfer to the Supreme Court of Missouri *en banc*, was filed May 6, 1947, within the time provided by Sec. 1.19 of the Rules of that Court, and said motion was denied May 12, 1947 (R. 65).

QUESTIONS PRESENTED.

The questions to be raised and presented in this Court upon the record are, substantially:

1. Whether the Act of the Missouri Legislature here in

question, in making it a criminal offense for one person to permit another to perform an act, namely: drink or consume intoxicating liquors, the doing of which by the latter is entirely lawful and innocent, deprives the former of due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. Whether such Act, in making it a criminal offense for one person to permit another to drink or consume intoxicating liquors "in, on or about" the premises of the former, is so vague, indefinite and uncertain as to deprive the former of due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT.

I.

In this case the Supreme Court of the State of Missouri has decided a Federal question of substance, involving the validity of a statute of that State on the ground of its being repugnant to the Constitution of the United States, in a way probably not in accord with the applicable and controlling decisions of this Court.

The question is one of a general nature, involving the rights and affecting the interests of an extensive class of persons engaged in the business of selling, or providing for compensation, food, beverages in the nature of soft drinks only, and entertainment. The decision of such question strikes at the roots of personal liberties and property rights.

II.

The Supreme Court of the State of Missouri has erroneously ruled that:

(a) Due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States is not denied by a State statute which declares one person to be guilty of a criminal offense if he permits the performance by another of an act[3] which, insofar as its performance by the latter is concerned, is entirely innocent and lawful.

(b) Due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States is not denied by a State statute which, with reference to an element of conduct declared to be criminal,[4] prescribes no standard that it is possible to know, is uncertain and ambiguous, and is in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application.

III.

The opinions and decisions of this Court hold and rule that:

(a) Certain fundamental freedoms, while not the subject of direct constitutional grant, are constitutionally recognized and confirmed as attributes of liberty incident to all free men, and, as such are secured, by the Fourteenth Amendment to the Constitution of the United States, against abridgement by the States. Among such free-

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[3] In this particular instance, the act of drinking or consuming intoxicating liquors.

[4] In this particular instance, the act of permitting the drinking or consumption of intoxicating liquors "in, or or about" his premises, by "any person operating premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor."

doms are the rights to contract, to engage in any of the common occupations, and to enjoy those privileges long recognized at common law as essential to the pursuit of happiness by free men.

(b) A legislative enactment of a State which, with reference to an element of conduct declared to be criminal, prescribes no standard of conduct which it is possible to know, or is in terms so vague and indefinite that men of common intelligence must guess as to its meaning and differ as to its application, violates fundamental principles of justice enbraced in the concept of due process of law, and violates the Fourteenth Amendment.

It follows that, under the principles of the controlling decisions of this Court, where (as here) an enactment of a State legislature violates fundamental concepts of due process of law, by making one person guilty of a criminal offense when he permits another to perform an act which in so far as concerns such other is entirely lawful and innocent, and by being so vague and indefinite, with reference to an element of conduct declared to be criminal, as to prescribe no standard of conduct that it is possible to know, it must be stricken down as repugnant to the Fourteenth Amendment to the Constitution of the United States.

PRAYER.

For the purpose of correcting the errors complained of, and to the end that the rights of petitioner may be determined in accordance with the Constitution of the United States, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Missouri, commanding it to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Supreme Court of

the State of Missouri in the within described cause of George Graff, Respondent, v. H. Sam Priest, as President of the Board of Police Commissioners of the City of St. Louis, Missouri et al., Appellants, No. 40171, to the end that the judgment of said Supreme Court of the State of Missouri in said cause may be reviewed by this Court, as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate, and that the judgment of said Supreme Court of the State of Missouri may be reversed by this Honorable Court.

GEORGE GRAFF,

Petitioner,

By ROBERTS P. ELAM,

Counsel for Petitioner.

SUPPORTING BRIEF.

I.

The Act of the 63rd General Assembly of Missouri here in question violates the natural rights and securities of petitioner, and deprives petitioner of his liberty and property, without due process of law, and is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because:

(A) The constitutional guaranties of "liberty" and "property" include (1) the right to perform, and to permit another to perform, any wholly innocent and lawful act, (2) the right to engage in any common lawful occupation, and (3) in the pursuit thereof, the right to contract with others respecting any lawful subject matter.

Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042;
Allgeyer v. Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 882;
Adair v. U. S., 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436;
Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441;
Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336.

(B) An act of a State legislature, such as the act here in question, which makes it a criminal offense for one person to permit the doing by another of a wholly innocent and lawful act, is not only void because unreasonable and arbitrary, but deprives the former person of liberty and property without due process of law. It is not within the

power of the legislature to declare that to be a crime which is wholly innocent and lawful.

Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441;
Pierce v. Society of Sisters, 268 U. S. 310, 45 S. W. 571, 69 L. Ed. 1070.

(C) A State legislature cannot, under the mere guise of police regulations, take away or abridge rights secured to citizens by the constitutional due process clause. Such rights may reasonably be abridged by police regulations only when such regulations bear a direct relationship to the evil sought to be remedied. Such is not the case here.

Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042;
Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 642;
Lochner v. New York, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937;
Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385;
House v. Mayes, 219 U. S. 270, 31 S. Ct. 234, 55 L. Ed. 213.

II.

The Act of the 63rd General Assembly of Missouri here in question further violates the natural rights and securities of petitioner, and deprives him of his liberty, without due process of law, and is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because, with reference to conduct declared criminal by such Act, the Act prescribes no standard of conduct that it is possible to know, and is so vague, uncertain and ambiguous that men of common intelligence must

necessarily guess at its meaning and differ as to its application.

U. S. v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516;

Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888;

Collins v. Kentucky, 234 U. S. 634, 34 S. Ct. 924, 58 L. Ed. 1510;

International Harvester Co. v. Kentucky, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284;

American Seeding Machine Co. v. Kentucky, 236 U. S. 660, 35 S. Ct. 456, 59 L. Ed. 773.

ARGUMENT.

Petitioner submits that the Act of the Missouri Legislature here in question violates his natural and fundamental rights, and deprives him of his liberty and property, without due process of law, so as to be violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for several reasons.

I.

(A) In every free government, every citizen and freeman is endowed with certain rights and privileges, to enjoy which no written law or statute is required. These are "fundamental," "inalienable," or "natural" rights, recognized among all free people. They are referred to in the second paragraph of the Declaration of Independence, wherein it is said:

> "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure [protect or make certain] these rights, governments are instituted among men, * * *" (Bracketed portion supplied),

are also referred to in the Preamble to the Constitution of the United States, wherein that document was proclaimed to be established in order to

> "* * * secure [protect and make certain] the blessings of liberty * * *" (Bracketed portion supplied.)

To protect these "inalienable," "fundamental," or "natural" rights, the Fourteenth Amendment to the Constitution of the United States provides:

> "* * * nor shall any State deprive any person of life, liberty or property without due process of law * * *."

By the term "liberty," in these organic provisions, is not meant mere freedom from physical or bodily restraint. As was aptly said in Meyer v. Nebraska, 262 U. S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual **to contract, to engage in any of the common occupations of life,** to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, **and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.** (Citing many cases.)" (Emphasis supplied.)

It would serve no useful purpose—even if it were possible—for us to here undertake to define and describe all of the various acts which might be encompassed within the term "those privileges long recognized at common law as essential to the order pursuit of happiness by free men," as that term is used by this Court to characterize the "liberty" guaranteed by the constitutional due process clauses. We shall, accordingly, confine ourselves to such as are deemed pertinent to the case at bar.

Plainly and specifically, the quoted terms include **the right to contract regarding lawful subject matter** (Meyer v. Nebraska, supra; see, also, Allgeyer v. Louisiana, 165 U. S. 578, 590, 17 S. Ct. 427, 41 L. Ed. 832; Adair v. United States, 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436; Coppage

v. Kansas, 236 U. S. 1, 16, 35 S. Ct. 240, 59 L. Ed. 441; Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336); and **the right to engage in any common occupation of life otherwise lawful** (Meyer v. Nebraska, supra; Adams v. Tanner, supra; Butcher's Union Co. v. Crescent City Co., 111 U. S. 746, 762; Powell v. Pennsylvania, 127 U. S. 678, 683); and, we confidently assert, they also include **the right to permit others to perform any and all acts which, in themselves, are wholly innocent and legal**—which, in fact, is not only a right, but a duty.

(B) It is notable that the act of the 63rd General Assembly of Missouri here in question does not make unlawful at any time the drinking or consumption of intoxicating liquors upon or about premises where food, beverages or entertainment are sold or provided for compensation—or at any other place, for that matter. **Under the Missouri law, one may drink or consume intoxicating liquor at whatever time he may please and wherever he may please, without violating any law.** What the act in question does is to make it unlawful, and criminal, for the operator of any premises where food, beverages or entertainment are sold, etc., **to permit** the drinking or consumption of intoxicating liquor by another—a wholly innocent and lawful act—upon or about such premises during certain times of the day. The act in question, accordingly, makes it unlawful, and criminal, for the operators of such premises, including this petitioner, to

1. Permit another to perform a wholly innocent and lawful act,

2. Thereby, himself perform a wholly innocent and lawful act,

3. Engage in a common occupation otherwise lawful, and

4. Contract with his customers regarding the sub-

> ject matter of their drinking or consuming intoxicating liquor—wholly lawful conduct on their part—upon his premises.

It is these things which the trial court denied, and this petitioner denies, the power of the State legislature to do under the due process clauses of the Fourteenth Amendment to the Federal Constitution. Their relationship permits them to be considered together, with some adherence to the order in which they are above set out.

It seems almost too plain for argument that a legislative enactment which makes it unlawful and criminal for one person to permit another to do a lawful act is not only not "due process of law"—i. e., is not, as said by Mr. Webster, "the general law" or "general rules which govern society" —but is, and must be declared to be, an arbitrary and unreasonable legislative judgment or fiat. This necessarily follows from the well-settled principle that a legislature may not define as criminal that which is, in itself, wholly innocent and lawful.

In Coppage v. Kansas, 236 U. S. 1, 16, 35 S. Ct. 240, 59 L. Ed. 441, this Court said:

> "Nor can a State * * * render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard."

See, also, Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070.

A restaurateur, theater operator, shopkeeper, or the like, in the operation of his business must, of necessity, contract with those whom he invites upon his premises in the conduct of his business. His invitation for them to come upon his premises, in itself, implies a contract between

him and his patron or customer to come upon the premises —otherwise the patron or customer would be a trespasser. The terms of the contract between the two may be limited by the operator of the premises as he sees fit, and he may restrict conduct of the patron on the premises which would otherwise be entirely innocent. For example: a restaurant operator might, if he wishes, refuse to permit his patrons to be without a coat (a not uncommon situation in hotel dining rooms), or he might refuse to permit his patron to smoke upon the premises (for aesthetic reasons)—both of which would otherwise be wholly innocent and lawful, but which are, nevertheless, the appropriate subject of the contract of invitation between the proprietor of the business and his patron. This right of contract regarding lawful conduct of the operator's patrons on his premises, in the conduct of an innocent and lawful business in which he has a right to engage, is a valuable property right, as well as an integral part of his personal liberty, both of which necessarily are guaranteed by the constitutional due process clauses. In this connection, there should be considered the language in Allgeyer v. Louisiana, 165 U. S. 578, 590, 17 S. Ct. 427, 41 L. Ed. 832, to the effect that:

> "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto."

If a State Legislature can, as is done by the Act here in question, make one person criminally liable for permitting another to perform the act of drinking or consuming intoxicating liquor, when such act is wholly innocent and lawful insofar as concerns the person performing it, then there is no limit to what a State Legislature can do. It could make one person criminally liable for not compelling another to perform that same act! And it

could compel the hotel proprietor, mentioned in the analogy made in the preceding paragraph of this brief, to permit his patrons to wear or not wear their coats in the hotel dining room. The arbitrariness, unreasonableness and invalidity of the legislation suggested would be immediately manifest.

If an operator of premises where food, beverages or entertainment are sold or provided for compensation obeys the act of the 63rd General Assembly of Missouri here in question, he is thereby deprived of fundamental rights: the liberty of conducting a common and lawful business in such a way as to permit his customers to perform on his business premises acts which in themselves are wholly innocent and lawful, and the right to contract (which relates to both liberty and to property rights) with his customers regarding the subject matter of conduct by them upon his premises which is wholly innocent and lawful but which consists of their drinking or consuming intoxicating liquors—a right which, we digress to point out, is one possessed by all other persons engaged in the common occupations of life. If he disobeys the Act, he is to be subject to arbitrary arrest and to be punished criminally for permitting the doing by his customers of acts which are in themselves wholly innocent and lawful, and, thereby, for himself performing an act which is wholly innocent and lawful. In either event, he is deprived of his fundamental rights of liberty and property, arbitrarily and unreasonably, and without due process of law.

(C) In presenting the foregoing argument, we wish to be understood as not controverting the power of a State Legislature, in the exercise of the police power, to regulate—or even prohibit entirely—the drinking or consumption of intoxicating liquors in public places, or in semi-public places such as the place of business of this peti-

tioner. However, we submit that, the ruling of the Supreme Court of Missouri to the contrary[5] notwithstanding, the Missouri Legislature has not done that by the Act here in question.

That the Act here in question does not regulate the drinking or consumption of intoxicating liquor, but regulates the business of providing food, beverages or entertainment, is readily demonstrable. That Act, by its terms, applies only to persons operating premises where food, beverages or entertainment are sold or provided for compensation, who do not possess a license for the sale of intoxicating liquor. Under the terms of the Act, any **patron** of an operator of such premises may drink or consume intoxicating liquor upon such premises at any and all times of any and all days, without coming within the terms of the Act; but, if the **operator** of such premises **permits** any patron to drink or consume intoxicating liquor upon such premises during certain hours of certain days, such **operator** violates the terms of the Act, is guilty of a criminal offense, and is subject to the penalties prescribed. Thus, by its terms, the Act is not applicable to the drinker or consumer of intoxicating liquor, nor to persons legally engaged in the liquor traffic, but is applicable only to persons who are not engaged in the liquor business and who operate premises where food, beverages or entertainment are sold or provided.

In any event, however, the Act in question cannot be upheld as a proper exercise of the police power. We fully recognize that, for the preservation of the public health, morals, welfare or safety—i. e., in the exercise of the police power—the rights of "liberty" and "property" guaranteed by the constitutional due process clause reasonably may be intrenched upon by the State Legislature, pro-

[5] Cf. Graff v. Priest, 201 S. W. 2d 945, 951.

vided, and only in the event, that such intrenchment relates directly to the evil sought to be remedied.

In Meyer v. Nebraska, 262 U. S. 390, 400, 43 S. Ct. 626, 67 L. Ed. 1042, it was said:

> "The established doctrine is that this liberty [guaranteed by the Fourteenth Amendment] may not be interfered with under the guise of protecting the public interest, by legislative action that is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts." (Bracketed portion supplied for continuity.)

In Jacobson v. Massachusetts, 197 U. S. 11, 25, 25 S. Ct. 358, 49 L. Ed. 643, it was said that:

> "A local enactment or regulation, even if based on the acknowledged police powers of a State, **must always yield in case of conflict** with the exercise by the General Government of any power it possesses under the Constitution, or **with any right which that instrument gives or secures.** (Citing cases.)" (Emphasis supplied.)

In Lochner v. New York, 198 U. S. 45, 56, 25 S. Ct. 539, 49 L. Ed. 937, it was said:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this proposition. Otherwise, the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people."

And, further (198 U. S., l. c. 57-58):

> "The mere assertion that the subject relates, though in a moderate degree to public health [morals, welfare or safety] does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate, before an act can be held valid which interferes with the general right of an individual to be free in his person * * *." (Bracketed portion supplied for continuity.)

In Lawton v. Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385, it was said:

> "The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of the police powers is not final or conclusive, but is subject to the supervision of the courts."

To like effect is House v. Mayes, 219 U. S. 270, 31 S. Ct. 234, 55 L. Ed. 213.

If the Act of the 63rd General Assembly of Missouri here in question was intended to be in the proper exercise of the police power, and to preserve the public health, morals, welfare or safety, by prohibiting or regulating the alleged evil of drinking or consumption of intoxicating liquor, then it is exceedingly strange that it did not prohibit the drinking or consumption of intoxicating liquor at all or certain designated places, at all or certain designated times, but, on the contrary, made no attempt to make such conduct unlawful at any place or at any time. What that Act did do was, not to regulate the drinking or consumption of intoxicating liquor, but to regulate the wholly innocent and lawful common occupations of selling or providing food, beverages or entertainment, under the guise of protecting

the public interests. That this is true is demonstrated by the fact that, if this act can be upheld as proper to preserve the public health, etc., and within the police power, as a regulation of the drinking or consumption of intoxicating liquor, then there is no end to the character of businesses which may be similarly regulated upon that same ground, **notwithstanding that the act of drinking or consumption of intoxicating liquor anywhere and at any time remains a wholly innocent, permissible and lawful act.**

As is plainly apparent from the very language of the Act in question, the protection of the public interests by regulation of the drinking or consumption of intoxicating liquor—the police power—is but a guise or masquerade under which the legislature has arbitrarily and unreasonably interfered with, molested and regulated the wholly innocent and lawful businesses of selling or providing food, beverages or entertainment, and invaded, abridged and hampered the rights of citizens to engage in and carry on such businesses. The Act, accordingly, under the authorities hereinbefore mentioned, was properly stricken down by the trial court, and should be again stricken down by this Court, as an unreasonable and unwarranted violation of constitutional guaranties under the Fourteenth Amendment.

II.

We submit that the Act of the 63rd General Assembly of Missouri here in question is, furthermore, violative of the due process of law guarantee of the Fourteenth Amendment in that it makes it unlawful for the operator of any premises where food, beverages or entertainment are sold, etc.,

> "* * * to permit the drinking or consumption of intoxicating liquor in, on or **about** such premises * * *."

The terms "in" and "on," in their relation to the premises described, are plain enough, but the use of the term "about," in relation to such premises, makes the Act vague, indefinite and uncertain so as to be likely to produce unusual—if not even weird—results. That the Missouri Legislature, by its use of the word "about," intended to make it unlawful for a proprietor of the designated type of premises to permit intoxicating liquor to be drunk or consumed in the vicinity of or near to his premises, as well as "in" or "on" them, is manifest from the Legislature's use of the word "about" in the disjunctive with the words "in" and "on." Under this Act, an operator of such premises could never know whether or not he was violating the Act if he permitted the drinking or consumption of intoxicating liquor upon the public streets, sidewalks and alleys, or even upon other private premises, adjacent to or near his premises—and what right would he have, or what duty could the Legislature place upon him, to prohibit such conduct (lawful insofar as concerned the person engaged in it) in such places? An operator of the designated type of premises could never know how far away therefrom the drinking or consumption of intoxicating liquor would have to take place before it was no longer "about" his premises.[6] He could never know whether he would be violating the Act if he permitted the drinking or consumption of intoxicating liquor in or on other places of business, or even private residential space, which might be located in the same building as his place of business.[7]

The vagueness, indefiniteness and ambiguity of the Act here complained of by this petitioner are but enhanced and magnified by what the Supreme Court of Missouri said in this connection, as follows (emphasis supplied):

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[6] Cf. Patterson v. State, 36 Ala. 297.

[7] Cf. William A. Doe Co. v. City of Boston, 262 Mass. 458, 160 N. E. 262.

> "Also, plaintiff says that the preposition 'about' in the phrase 'in, on or about said premises,' as used in the act, makes it so vague that the average person would not know when he might be violating the act. If a case should arise where guilt hinged on the scope of 'about,' **such would be a question of fact for the trier of the facts or of law for the court, as the court determined.**" Graff v. Priest, 201 S. W. 2d 945, 951.

Evidently it is the concept of the Supreme Court of Missouri that it is not the Act itself, but the judicial proceedings and rulings under it, which may prescribe the rule governing conduct and warning against transgression, and that persons may be required at peril of life, liberty or property to speculate concerning the meaning of such Act. Such concept is contrary to the principles announced by this Court in Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888.

The foregoing demonstrates that, with reference to an element of conduct declared to be criminal, the Act here in question prescribes no standard of conduct that it is possible to know, is uncertain and ambiguous, and is in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application. That legislation of such character is void, because it violates fundamental principles of justice and violates the guarantee of due process of law made by the Fourteenth Amendment, is well settled. Compare: Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888; U. S. v. L. Cohen Gro. Co., 255 U. S. 81, 41 S. Ct. 598, 65 L. Ed. 516; American Seeding Machine Co. v. Kentucky, 236 U. S. 660, 35 S. Ct. 456, 59 L. Ed. 773; Collins v. Kentucky, 234 U. S. 634, 34 S. Ct. 924, 58 L. Ed. 1510; International Harvester Co. v. Kentucky, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284.

CONCLUSION.

From the foregoing, we submit that it clearly appears that the Act of the 63rd General Assembly of Missouri here in question (Laws of Missouri 1945, pp. 1032-1035) deprives this petitioner of his liberty and property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

It consequently follows that the Supreme Court of Missouri was in error in holding and ruling to the contrary. Petitioner, therefore, respectfully submits that this Honorable Court should issue a writ of certiorari in order that such error may be corrected, in order that the judgment of the Supreme Court of Missouri may be reversed, and in order that this petitioner may receive the benefits of the due process of law guaranteed him by the Federal Constitution.

Respectfully submitted,

ROBERTS P. ELAM,
Counsel for Petitioner.

APPENDIX.

The Act of the 63rd General Assembly of Missouri here involved, being reported in Laws of Missouri, 1945, pp. 1032-1035, inclusive, is in words and figures as follows:

AN ACT

To amend Article 1, Chapter 32 of the Revised Statutes of Missouri, 1939, known as the Liquor Control Act, by adding a new section to said Article 1, Chapter 32 to be known as Section 4895a, regulating the drinking and consumption of intoxicating liquor in premises where food, beverages or entertainment are sold or provided for compensation; providing for the issuance of licenses to operate such premises and fixing the fees therefor; providing for the issuance of licenses to operate such premises by incorporated cities having a population of more than twenty thousand inhabitants; providing that such cities, may, by ordinance, further regulate the drinking and consumption of intoxicating liquor on such premises; providing qualifications for persons to whom a license may be granted and the giving of a bond by the applicant therefor before approval of a license; regulating the drinking and consumption of intoxicating liquor on premises licensed for sale of intoxicating liquor by the drink; providing that premises operated in violation of this Act are a public and common nuisance; providing for enjoining the same; providing that persons violating this Act shall, upon conviction, be guilty of a misdemeanor; providing that the Supervisor of Liquor Control may issue regulations for enforcement of this Act; and containing a saving clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That Article 1, Chapter 32, Revised Statutes of Missouri, 1939, known as the Liquor Control Act, be and the same is hereby amended by adding to said Article 1, Chapter 32, a new section to be known as Section 4895a, regulating the drinking and consumption of intoxicating liquor in premises where food, beverages or entertainment are sold or provided for consumption; providing for the issuance of licenses to operate such premises and fixing the fees therefor; providing for the issuance of licenses to operate such premises by incorporated cities having a population of more than twenty thousand inhabitants; providing that such cities may, by ordinance, further regulate the drinking and consumption of intoxicating liquor on such premises; providing qualifications for persons to whom a license may be granted and the giving of a bond by the applicant therefor before approval of a license; regulating the drinking and consumption of intoxicating liquor on premises licensed for sale of intoxicating liquor by the drink; providing that premises operated in violation of this Act are a public and common nuisance; providing for enjoining the same; providing that persons violating this Act shall, upon conviction, be guilty of a misdemeanor; providing that the Supervisor of Liquor Control may issue regulations for enforcement of this Act; and containing a saving clause, which new section shall read as follows:

Section 4895a. It shall be unlawful for any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor, to permit the drinking or consumption of intoxicating liquor in, on or about said premises between ten o'clock P. M. and six o'clock A. M. the following day, without having a license as in this section provided.

Application for such license shall be made to the Supervisor of Liquor Control on forms to be prescribed by him, describing the premises to be licensed and giving all other reasonable information required by the form. The license shall be issued upon the payment of the fee required herein. A license shall be required for each separate premises and shall expire on the 30th day of June next succeeding the date of such license. The license fee shall be $60.00 per year and the applicant shall pay $5.00 for each month or part thereof remaining from the date of the license to the next succeeding 1st of July. Applications for renewals of licenses shall be filed on or before the 1st of May of each year.

The drinking or consumption of intoxicating liquor shall not be permitted in, upon or about the licensed premises by any person under twenty-one years of age, or by any other person between the hours of 1:30 A. M. and 6:00 A. M. on any week day, and between the hours of 12 o'clock midnight Saturday and 12 o'clock midnight Sunday, or on the day of any general, special, or primary election in this state, or upon any county, township, city, town, or municipal election day during the hours the polls are legally open. Licenses issued hereunder shall be conditioned upon the observance of the provisions of this Act and the regulations promulgated thereunder governing the conduct of premises licensed for the sale of intoxicating liquor by the drink. The provision of this section regulating the drinking or consumption of intoxicating liquor between certain hours and on Election day and Sunday shall apply also to premises licensed under this Act to sell intoxicating liquor by the drink. In any incorporated city having a population of more than twenty thousand (20,000) inhabitants, the Board of Aldermen, City Council, or other proper authorities of incorporated cities may, in addition to the license fee herein required, require a license not exceeding Three hundred dollars

($300.00) per annum, payable to said incorporated cities, and provide for the collection thereof; make and enforce ordinances regulating the hours of consumption of intoxicating liquors on premises licensed hereunder, not inconsistent with the other provisions of this law, and provide penalties for the violation thereof. No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village.

Before any application for the license herein provided for shall be approved, the Supervisor of Liquor Control shall require of the applicant a bond to be given to the State in the sum of one thousand dollars ($1,000.00), with sufficient surety, such bond to be approved by the Supervisor of Liquor Control, conditioned that the applicant shall at all times observe the provisions of this Act and the Regulations promulgated thereunder governing the conduct of premises licensed for the sale of intoxicating liquor by the drink and the Regulations promulgated by him construing and enforcing the provisions of this section.

Any premises operated in violation of the provisions of this section, or where intoxicating liquor is consumed in violation of this section, is hereby declared to be a public and common nuisance and it shall be the duty of the Supervisor of Liquor Control and of the Prosecuting or Circuit Attorney of the City of St. Louis, and the Prosecuting Attorney of the county in which the premises are located to enjoin such nuisance.

Any person operating any premises, or any employee, agent, representative, partner or associate of such person,

who shall knowingly violate any of the provisions of this section, or any of the laws or regulations herein made applicable to the conduct of such premises, shall, upon conviction, be deemed guilty of a misdemeanor.

The Supervisor of Liquor Control is hereby empowered to promulgate regulations necessary or reasonably designed to enforce or construe the provisions of this section, and is empowered to revoke or suspend any license issued hereunder, as provided in this Act, for violation of this section or any of the laws or regulations herein made applicable to the conduct of premises licensed hereunder.

Section 2. If any section, sentence, clause or phrase of this Act is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portion of the Act.